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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

STEVEN AMADOR,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES  
COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

No. B191129

(Super. Ct. No. KA070486)  
(Wade Olson, Commissioner)

ORIGINAL PROCEEDING; application for writ of mandate. Writ granted.

Michael P. Judge, Public Defender of Los Angeles County, Albert J. Menaster,  
Lisa Washington and Mark G. Harvis, Deputy Public Defenders, for Petitioner.

Sedgwick, Detert, Moran & Arnold, Michael L. Fox and Orly Degani for  
Respondent.

Steve Cooley, District Attorney for Los Angeles County, and Patrick D. Moran,  
Deputy District Attorney, for Real Party in Interest.

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Steven Amador filed a petition for a writ of mandate directing the superior court to set aside its order denying his motion for an appointment of an audio and video tape transcription firm to prepare transcripts of recorded police interviews of witnesses, potential suspects, Amador and his co-defendants. Amador claims he demonstrated sufficient need for the professionally prepared transcripts to assist in trial preparation and to cross-examine witnesses at trial. He points out police summaries of the transcripts omit critical details and also that statements made on the tapes are inconsistent with testimony from the preliminary hearing. Consequently Amador claims the trial court erred in concluding he was not entitled to the transcripts because the interviews were in English and because, in the court's view, the public defender, district attorney and alternative public defender's respective offices have sufficient staff to prepare the transcripts. Amador is correct. Amador has demonstrated the requisite need for the appointment of an expert transcription firm to prepare transcripts of the interviews. As we shall explain, the court's reasons for denying the motion are without merit. Consequently, we issue the writ of mandate.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

Amador is charged with murder, two gun discharge enhancements and a street gang enhancement.<sup>1</sup> Amador is represented by the Los Angeles County Public Defender's office.

On March 22, 2006, Amador filed an ex parte request for an order to appoint a tape transcription expert. In the declaration supporting the request, counsel stated:

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<sup>1</sup> Amador has two co-defendants, Rudy Lozano, charged with murder, a gun discharge and a gang enhancement, and Jose Alfredo Gomez, charged with being an accessory after the fact and a gang enhancement.

“The discovery in this case is quite voluminous. I have listened to the tapes and read the police reports in this case. Discovery includes video-tapes and audio-tapes of numerous witnesses, suspects and defendants involved in this incident. Some of the statements were recorded on the tapes which describe each witness’s personal account of the incident. Some important elements are often omitted from the police report summary of witnesses[’] statements. The statements made on tape are sometimes inconsistent with what is reflected in the preliminary hearing transcript. The full account of each witness statement is often not reflected in the very brief police report summary. [¶] Defendant contends he is not guilty of this crime and had nothing to do with the shooting of Mr. Maya. Several suspects were detained that evening and arrested, but the district attorney did not file against all suspects. In order to effectively cross-examine witnesses at trial, it is necessary to have the statements of all witnesses transcribed. Without transcribing the statements, neither defense counsel nor the prosecution can effectively cross-examine or rehabilitate [sic] a witness. A transcription expert can assist defense preparation of this case for trial.”

The request was denied. The motion was returned to defense counsel with two post-it notes attached. One post-it note containing the initials of the commissioner who heard the motion, stated: “Please have Judge Falls review. Apparently P.D. wants tapes in English transcribed so that she doesn’t have to take notes, etc - ? I have a problem with this unless there is a foreign language, etc. . . .” The second post-it note containing the initials of Judge Falls stated: “Denied, that is what the sec. Staff of the Pds office is paid to do.”

Thereafter, on April 20, 2006, Amador’s counsel filed a second motion to appoint a tape transcription expert. Counsel’s declaration contained essentially the same contentions as contained in the declaration supporting the ex parte motion and pointed out the request involved six videotapes and eight audiotapes containing recorded witness statements. The declaration also added the following:

“The secretaries of the Pomona Public Defenders office are not certified transcription experts. There are only three secretaries servicing fifteen attorneys in the Pomona Superior Court. Not only are the secretaries not qualified to transcribe tapes, it would never be able to be completed due to their secretarial duties. [¶] I am informed and believe that Lutz & Co., Inc., is a firm who is experienced in the field of transcription of witness’ tapes. [¶] Counsel will not be able to render effective assistance of counsel to the defendant without the tapes being transcribed. Furthermore, these tapes must be transcribed according to California Rules of Court 243.9.”

At the hearing on the motion, counsel for all defendants and the prosecutor joined Amador’s request. The court denied the motion, finding:

“[The transcripts] are in English. All right. And there’s been no problems with either side deciding that the tapes that they’ve listened to are two different versions or saying two different things. [¶¶] The real problem here’s these tapes [are] in English and the court doesn’t appoint experts under the circumstances to translate these tapes at this point. They’re in English. [¶] If there’s a problem down the line, the public defender’s office has people that can – if the defense counsel does not want to listen to them themselves and decipher what they say, there’s people in the office that can do that. The District Attorney has the people. Alternative defense counsel has people. The motion is denied. I’m not finding good cause to appoint this expert at this time.”

On May 22, 2006, Amador filed this petition for a writ of mandate, requesting an order (1) directing the superior court to set-aside its April 20, 2006, order for appointment of the transcription expert; and (2) directing the superior court to issue an order granting

the motion.<sup>2</sup> The real party in interest, the People, joined in the petition.

### ***DISCUSSION***

In his petition, Amador asserts the court erred in denying his request for a tape transcription expert. Amador argues the transcripts are necessary to preserve his constitutional rights to confront and cross-examine witnesses and to effective assistance of counsel. He asserts he stated a sufficient need for the transcripts below, arguing that they were necessary to assist him in preparing his defense and for cross-examining witnesses at trial. He plans to use the transcripts to cross-examine various witnesses about discrepancies between their statements to police and their preliminary hearing testimony. Amador also argues he needs the transcripts to properly examine investigating police officers and to challenge the integrity of the investigation based on how the police selectively prepared witness statement summaries, leaving out critical details. He further maintains the court's stated rationale during the hearing for denying his motion lacked support in the record and was legally erroneous. Amador points out whether an indigent criminal defendant is entitled to a free transcript does not depend on the language spoken on the tapes, and that he demonstrated the public defender's office did not have the staff or expertise to prepare the transcripts.

The decision of whether to grant a defendant's request for an appointment of an expert is discretionary. (See *People v. Corenevsky*, *supra*, 36 Cal.4th at p. 321; *People v. Vатели* (1971) 15 Cal.App.3d 54, 60 ["Although Evidence Code section 730 provides for court-appointed experts, that statute does not grant a defendant in a criminal case an absolute right to the appointment of an expert on his behalf but is a matter discretionary with the court"].) While a trial court's discretionary order is presumed correct, and error

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<sup>2</sup> A petition for a writ of mandate is the appropriate means of obtaining review of a denial of a motion for court appointment of a defense expert. (See *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307.)

must be affirmatively shown, nonetheless an abuse is demonstrated where the court's order appears to lack all evidentiary support in the record or is based on erroneous legal principles. (See *In re Cortez* (1971) 6 Cal.3d 78, 85-86 ["The term [judicial discretion] implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. [¶] To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision"].)

In its opposition to the petition, the trial court argues it did not abuse its discretion in denying Amador's motion. The court reiterates its stated reasons for denying the motion at the hearing: (1) the court does not appoint transcription experts to prepare transcripts when the underlying tape is in English; (2) the parties did not disagree about what was said on the tapes; and (3) if problems did arise, counsel had staff that could prepare the transcripts.

Before this court, the trial court now presents additional justifications for denying the request. Specifically, the court argues Amador did not present a sufficient showing the transcripts requested were necessary to the defense. The respondent asserts the request was overbroad and "conclusive" in that it did not specify the nature of the inconsistent witness statements or omissions from the police summaries and did not identify which interview tapes contained the inconsistencies or omissions. In addition, the court contends Amador failed to provide any evidence the public defender's office lacked sufficient funds in its own budget to pay for those transcripts.

With all of the arguments in mind, we turn to the law governing requests for appointment of defense experts and services, including requests for transcripts.

Federal due process and equal protection entitle an indigent criminal defendant to "[m]eaningful access to justice." (*Ake v. Oklahoma* (1985) 470 U.S. 68, 77; *Griffin v. Illinois* (1956) 351 U.S. 12, 18-19.) The United States Supreme Court "has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair

opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." (*Ake v. Oklahoma*, *supra*, 470 U.S. at p. 76.)

Similarly, California courts have recognized due process and equal protection require a defendant's right to a fair trial be unhampered by his or her indigency. (*People v. Worthy* (1980) 109 Cal.App.3d 514, 519.)

In *Ake* the court further observed that mere access to the courthouse doors does not assure the proper functioning of the adversary process, and that "a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." (*Ake v. Oklahoma*, *supra*, 470 U.S. at p. 77.) To implement that principle, "basic tools of an adequate defense" must be provided by the state. (*Britt v. North Carolina* (1971) 404 U.S. 226, 227.) The *Ake* court held the "basic tools" a defendant needs include, among other things, the effective assistance of counsel. (*Ake v. Oklahoma*, *supra*, 470 U.S. at p. 77.) The right to effective assistance of counsel includes the right to ancillary services necessary to prepare a defense. (*People v. Corenevsky*, *supra*, 36 Cal.3d at pp. 319-320; see Pen. Code, § 987.2.)

A right to ancillary defense services, including the appointment of experts and investigators, will arise if the need is shown by reference to "the general lines of inquiry [the defendant] wishes to pursue, being as specific as possible." (*People v. Fixel* (1979) 91 Cal.App.3d 330, quoting *Mason v. State of Arizona* (9th Cir. 1974) 504 F.2d 1345, 1352; *People v. Worthy*, *supra*, 109 Cal.App.3d at p. 520 ["Having established his

indigent status, defendant is constitutionally entitled to those defense services for which he demonstrates a need”].)<sup>3</sup>

The *Ake* court identified three factors relevant to a determination of whether a defense tool is important enough to require the state to provide it to the indigent defendant. “The first is the private interest that will be affected by the action of the State. The second is the governmental interest that will be affected if the safeguard is to be provided. The third is the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided.” (470 U.S. at p. 77.)

The state and the individual have a compelling interest in the accuracy of a criminal proceeding that places the defendant’s life or liberty at risk. (470 U.S. at pp. 78-79.) The third factor, the probable value of the requested tool, depends upon the procedural and factual circumstances of the particular case.

When the requested “tool” concerns a transcript, the focus is, as in a request for an appointment of a defense expert, on whether the transcript is *necessary* for an effective defense or appeal. (*Britt v. North Carolina, supra*, 404 U.S. at p. 227; *People v. Hosner* (1975) 15 Cal.3d 60, 64.) Where the transcript requested is that of a prior trial upon retrial, need is presumed and it is reversible error to refuse to grant the request. (*Hosner, supra*, 15 Cal.3d at pp. 65-69.) As to requests for transcripts of other proceedings, the need for reporter’s transcripts at state expense is determined on a case-by-case basis. (*Britt v. North Carolina, supra*, 404 U.S. at p. 227.) A trial court may properly deny a request for free transcripts for use in a motion for new trial or for use in other requests for collateral relief unless the indigent defendant first demonstrates that the transcript is necessary for effective representation by counsel. (See e.g., *People v. Bizieff* (1991) 226 Cal.App.3d 1689, 1701-1703 [defendant not entitled, “as a matter of absolute right,” to

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<sup>3</sup> A criminal defendant represented by the public defender’s office, like Amador, is considered indigent for the purpose of determining his right to defense services, including transcripts. (*People v. Tarver* (1991) 228 Cal.App.3d 954, 957.)



transcript of trial proceedings for use in connection with motion for new trial].) The court must decide each case on its own facts and circumstances in determining whether the defendant has made a sufficient showing of need. (*People v. Lopez* (1969) 1 Cal.App.3d 78, 83, 81; *People v. Bizieff*, *supra*, 226 Cal.App.3d at pp. 1702-1703; see *People v. Hayden* (1994) 22 Cal.App.4th 48, 55 [defendant not automatically entitled to transcript of entire trial of severed codefendant]; *In re Darrell T.* (1979) 90 Cal.App.3d 325, 333, [indigent defendant not entitled to transcripts of codefendant’s juvenile fitness hearing]; cf. *Woods v. Superior Court* (1990) 219 Cal.App.3d 708, 713 [indigent defendant entitled to transcripts of prior civil proceeding concerning same events as those alleged in criminal complaint].)

Two factors relevant to the determination of the need for transcripts are the value of the transcript to the defendant in connection with the proceeding for which it is sought, and the availability of alternatives that would fulfill the same functions as a transcript.<sup>4</sup> (*Britt v. North Carolina*, *supra*, 404 U.S. at p. 227.)

Preliminarily we observe the request here does not concern a “proceeding” as the term has been used in the case law concerning transcript requests. Amador is requesting transcripts from police interviews of witnesses, not official court proceedings. Thus, this request is more akin to one for pre-trial ancillary defense services for the appointment of an expert to interpret or analyze evidence. Nonetheless, however characterized, whether the court should grant Amador’s request centers on whether Amador demonstrated a sufficient need for the services.<sup>5</sup>

In our view, Amador made the requisite showing the transcripts of the police interviews were necessary for his defense and he needed the appointment of a

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<sup>4</sup> An indigent defendant who claims a right to a free transcript does not bear the burden of proving inadequate any suggested alternatives. (*Britt v. North Carolina*, *supra*, 404 U.S. at p. 230; *People v. Markley* (2006) 138 Cal.App.4th 230, 240.)

<sup>5</sup> Amador is not claiming he has a *presumptive* need for the appointment of an expert.

transcription firm to prepare them. Amador's counsel declared she planned to use the transcripts to cross-examine witnesses about discrepancies between their statements to police and the preliminary hearing testimony. Amador also argued he needed the transcripts to properly examine investigating police officers concerning "critical" information omitted from the police summaries. He further informed this court he planned to challenge the integrity of the investigation based on how the police selectively prepared witness statement summaries.

The transcripts he requests do not concern collateral or tangential matters. They contain witness statements, including Amador's statement, those of his co-defendants and other suspects concerning the crimes. These witness' statements and what the tapes reveal about the police investigation go to the heart of the charges against Amador and may relate directly to his defense. Moreover, to the extent that Amador and the People intend to use these witness statements during trial, no one has suggested a better or more reasonable alternative to the use of actual transcripts. As Amador notes, pursuant to Rules of Court, rule 243.9, a transcript is required where an audio or video-tape is offered into evidence. (See Cal. Rules of Court, rule 243.9(a).)

Contrary to what respondent asserts here, Amador provided enough general information for the trial court to consider his request and to warrant granting it. (See *Corenevsky, supra*, 36 Cal.3d at p. 320 ["[A]lthough such motions can be granted only if supported by a showing that the investigative services are reasonably necessary [citation], it has been recognized that because of the early stage at which the request typically arises, it will often be difficult for counsel to demonstrate a clear need for such funds. [Citation.] Therefore the trial court should, in the appropriate circumstances, 'view with considerable liberality a motion for such pre-trial assistance'"].) While Amador perhaps could have provided more details concerning the omissions and discrepancies, the court did not ask him to do so. The court did not deny the motion because his request was

vague or too general.<sup>6</sup> Instead the court simply denied it for reasons that had little connection to whether Amador needed the transcripts to prepare for trial. The fact that the language spoken on the tapes was English, or that the parties had yet to disagree with what was stated on the tapes, are beside the point.<sup>7</sup> Rather, these considerations relate to who should prepare (and pay) for the transcripts. The court's stated reasons suggest the view that because the tapes are in English, transcripts should be relatively easy to prepare and thus an expert transcription firm is unnecessary. The declaration of Amador's counsel, however, provided evidence that the public defender's office did not have the expertise, personnel, or time to prepare the transcripts. Consequently, the trial court's finding that counsel had "people" in their respective offices who could prepare these transcripts, is on the record before this court, unfounded.

Finally, we turn to respondent's claim it properly denied the request because Amador failed to demonstrate the public defender's office lacked the funds to prepare them. First we observe the court did not cite this as a reason for denying the motion below, we therefore may decline to consider it a basis to uphold the order. (See *Corenevsky, supra*, 36 Cal.3d at p. 323 [orders are viewed in light of the facts, statements, considerations before the court at the hearing].) Second, we observe that no case holds that an indigent criminal defendant's right to ancillary services is conditioned upon counsel *first establishing* that he or she lacks the funds to pay for services. (*People*

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<sup>6</sup> If the court had found the request overbroad the court should have denied it without prejudice and to allow defendants an opportunity to reassert a more detailed request.

In any event, given Amador's stated intent to challenge the integrity of the police investigation, a request for transcripts for *all* witness statements would not have been inapt. Analysis of transcripts from all witnesses (not just those which differed from the police summaries) would be required fully to assess the propriety and sufficiency of the police investigation.

<sup>7</sup> Before this court, the respondent does not attempt to defend its decision on the basis that the transcripts were in English or based on the fact that the parties did not disagree about what was said on the tapes.

*v. Worthy*, *supra*, 109 Cal.App.3d at p. 520 [“The test for entitlement to county assistance in defense preparation is indigency. A test based upon the status of defense counsel would be constitutionally infirm”].) In addition, pursuant to Penal Code section 987.2 counsel for indigent criminal defendants generally do not have to shoulder the responsibility to pay for defense related services. (See Pen. Code, § 987.2 [providing counsel appointed for an indigent defendant shall not only be compensated by a reasonable fee but also shall be reimbursed for his necessary expenses]; *Corenevsky*, *supra*, 36 Cal.3d at pp. 318-320.)

Nonetheless, case law also provides a court may inquire of the public defender’s office whether it has the funds to pay for the preparation of the transcript, and thereafter give the public defender’s office an opportunity to return to court for payment if no alternative funds were available. (See *People v. Huffman* (1990) 219 Cal.App.4th 1480, 1484-1485; *People v. Rutkowski* (1983) 146 Cal.App.3d 248, 251; *People v. Contreras* (1981) 127 Cal.App.3d 248, 253-254.) However, the ultimate responsibility to ensure payment for defense services, including requests for transcripts, lies with the court. (See Gov. Code, § 69952 [statute vests power in court to order payment for transcripts from county treasury]; *People v. Rutkowski*, *supra*, 146 Cal.App.3d at pp. 250-251.) Here, however, as in *Rutkowski*, the trial court did not explore the funding issue below,<sup>8</sup> thus counsel was effectively ordered to pay for the transcript without reference to its ability to pay. Hence, as the court in *Rutkowski* held, the court improperly shifted its responsibility to insure payment to counsel.

In sum, because Amador demonstrated the appointment of a transcription firm to prepare transcripts of witness statements was reasonably necessary for his defense, and

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<sup>8</sup> Based on representations of counsel from the public defender’s office and the district attorney’s office to this court, returning this matter to the trial court to explore alternative funding sources would be an exercise in futility. Counsel for the People and Amador have both indicated they lacked the resources in their budgets to pay for the transcription of these tapes.

because there appears no rational reason for denying the request, we conclude the court's order denying the motion cannot stand.

***DISPOSITION***

Let a writ of mandate issue directing the respondent court to set aside its April 20, 2006, order denying the request to appoint a transcription expert and to enter a new and different order granting the motion.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

**WOODS, J.**

**We concur:**

**PERLUSS, P.J.**

**JOHNSON, J.**